

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
Region 32**

**FALCK NORTHERN CALIFORNIA  
CORP.,<sup>1</sup>**

**Employer**

**and**

**Case 32-RC-275992**

**NATIONAL ASSOCIATION OF  
GOVERNMENT EMPLOYEES, NAGE EMS,**

**Petitioner**

**DECISION AND DIRECTION OF ELECTION**

On April 22, 2021, a petition was filed by National Association of Government Employees, NAGE EMS (Petitioner) seeking to represent certain employees of Falck Northern California Corp. (Employer). Specifically, the Petitioner seeks to represent a unit of all Operations Captains (captains), excluding all other employees. The approximately 15 individuals in the petitioned-for unit work out of the Employer's locations at 28333 Industrial Road, Hayward Ca 94545 (the Hayward facility); 283 East Airway Blvd., Livermore CA 94551 (the Livermore facility); and 325 Fallon Street, Oakland CA 94607 (the Oakland facility).

The Employer asserts that the captains are supervisors within the meaning of Section 2(11) of the Act and therefore the petition should be dismissed. The Petitioner argues to the contrary that those individuals are not statutory supervisors and therefore comprise an appropriate bargaining unit. Because supervisory status involves a statutory exclusion, the party seeking to exclude individuals on that basis – in this case, the Employer – bears the burden of proof and has to have provided specific evidence in support of its position.

A hearing was held before a Hearing Officer of the National Labor Relations Board on May 12, 2021, and the parties timely filed briefs. After having carefully reviewed the record, as well as the respective positions and briefs filed by the parties, and for the reasons set forth below, I find that the Employer has failed to meet its burden of showing that individuals in the

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<sup>1</sup> I grant the parties' joint motion to amend the petition and other formal documents in this proceeding to reflect the correct names of the parties as set forth herein.

petitioned-for unit are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I am directing that an election be held in the petitioned-for unit of all operations captains.

## ***THE EMPLOYER'S OPERATION***

### ***Background and Management Structure***

The Employer provides emergency medical services and ambulance transport to the County of Alameda in Northern California pursuant to a detailed, 106-page fee-for service contract in effect from October 1, 2018 to June 30, 2024 (the Contract).<sup>2</sup> Pursuant to the Contract, the Employer provides both advanced and basic life support.<sup>3</sup>

NAGE Local 510 currently represents the Paramedics and EMTs employed by the Employer (the Unit), having represented them under the predecessor contractor Paramedics Plus, from whom the Employer took over the Contract in 2018. The Employer further adopted the Collective-Bargaining Agreement (the Agreement) in effect between the predecessor and NAGE Local 510.<sup>4</sup>

With regard to management structure, the Contract requires the Employer to maintain certain “leadership” positions. The Employer’s Director in Chief of Alameda County Operations oversees the entire operation: other managers report to her, including shift commanders and lieutenants. The Division Chief of Operations oversees the shift commanders, lieutenants,<sup>5</sup> and the petitioned-for captains. The Employer’s Union-represented EMTs and paramedics report to the captains, who in turn report to the shift commanders.

Under the terms of the Contract, the Employer provides ambulance services for Alameda County 24/7, operating with a total of 450 paramedics and EMTs and approximately 75 ambulances, or “units.” Peak ambulance deployment during the busiest shift is between 50 and 55: the minimum number can be half that in the middle of the night. Each ambulance has a crew of two employees and occasionally a trainee – the crew can be two paramedics or two EMTs or one of each. The Ambulances are deployed from the three facilities in Hayward,

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<sup>2</sup> There are liquidated damages assessed if the Employer fails to be in compliance with the call response time requirements set forth in the Contract, as well as penalties for breach, including forfeiture of a \$15 million bond and seizure of the Employer’s assets, including the ambulances, each of which is valued at approximately \$250,000.

<sup>3</sup> Advanced life support can be provided when both a paramedic and an EMT are present: only basic life support can be provided by EMTs alone.

<sup>4</sup> Petitioner does not seek to add the captains to the existing unit via a self determination election; rather, the instant petition was filed to organize the captains into their own separate local.

<sup>5</sup> The lieutenants are described as deployment officers or “dispatch system status supervisors” who work in the dispatch center to monitor the dispatchers. The lieutenants are employees of the Employer, unlike the dispatchers who are employees of the County. The lieutenants ensure the work of the dispatchers is compliance with the Contract. They also coordinate meal-breaks and shift changes for field personnel, inasmuch as they are able to see the deployment over all four zones at once, in contrast to the captains who can only see their respective zones. The lieutenants can also address deployment problems or delays that a captain may have missed due to being otherwise engaged.

Livermore, and Oakland, as well as from “posting” locations with the historically highest probability of call volume areas.<sup>6</sup> The crews and the captains work 12-hour shifts on a weekly rotation: there are also part-time crew members who select their shifts as available.

Four captains are assigned to one 12-hour shift and each oversees one of four geographic “zones” as required and designated by the Contract: the four captains on a 12-hour shift report directly to the shift commander for that shift.<sup>7</sup> During their shift, the captains utilize special “emergency response supervisor vehicles” as mandated by the Contract, which are SUVs from which they can communicate with dispatch and the hospitals and monitor the paramedics and EMTs in their respective zone. The captains are responsible for anything that happens in that zone during their shift, including overseeing the crews and the types of calls and hospitals they have been dispatched to. The dispatch center itself is staffed by the Alameda County Regional Emergency Communications Center (ACRECC), a division of the County rather than by direct employees of the Employer with the exception of the Employer’s lieutenants, who are stationed at the ACRECC, as discussed above.

### ***The Captains’ Job Descriptions, Duties, Training, and Wages***

The Contract provides that captains be experienced, clinically competent paramedics with prior teaching/training experience, and makes them responsible for providing direct case-by-case medical oversight of all clinical personnel on the scene, as well as coordinating data collection for ongoing compliance with the Contract. The job description maintained by the Employer for the captains further provides that they are “responsible for the daily oversight of company-wide operations while demonstrating the highest level of customer service,” and work in close collaboration with the base and communications center leads to ensure the safe and efficient operations of the company. The job description further provides, *inter alia*, that the captains demonstrate a high degree of familiarity and compliance with all internal and customer policies and procedures related to daily operations and provide guidance and/or corrective action to subordinates when needed.

Captains receive special training from the Employer in drug recognition intoxication identification so that they may discern when an employee might be under the influence or incapacitated. Also, the Employer is currently conducting company-wide training for upper management, including the captains, on leadership and standardized operating procedures.<sup>8</sup> Captains also receive some training in union-management relations and the provisions of the Agreement: they do not participate in grievance processing or adjustment, however. On occasion with a high-acuity call, a captain can accompany a unit on a call if needed to provide additional clinical, logistical, or operational support, but cannot respond to a call alone. The

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<sup>6</sup> A posting can be a particular intersection, neighborhood, or a sporting event where crews are on standby if needed.

<sup>7</sup> The zones are North County, Mid-County, South County, and East County. North County is divided into two sub-zones because it is the largest geographically and has the largest number of ambulances assigned to it.

<sup>8</sup> This leadership training, dubbed “Dare to Care,” was initiated in Denmark where the Employer’s parent company is located and is being rolled out to Falck USA throughout the U.S.

captains can also but rarely do provide on-site clinical support to an ambulance crew: however, they can provide field support such as bringing supplies, equipment, and food to the crews.

The captains' salary range is between \$102,000 and \$110,000 per year. In contrast, the EMTs are paid hourly between \$18 and \$35/hour, and the paramedics are paid between \$23 and \$49/hour as provided under the Agreement.

The captains are not involved in the granting of vacation, sick leave, or time off requests of the crews they oversee, or of any other unit employees. Most scheduling, including time off and vacation requests, is done through an electronic scheduling system, which also records overtime.<sup>9</sup>

There is no evidence that the unit employees receive periodic evaluations or if the captains participate in them.

### ***The Captains' Assignment of Employees to Places to Ensure Compliance with Contract Metrics***

The specific job duties of the captains include assisting to monitor operational compliance with performance, which includes ensuring that ambulance crews respond on time to dispatches, or "calls," and then "roll off" or leave hospitals within other time limits determined by the County: this monitoring maximizes response time and capability to respond to new 911 calls. The Employer's obligation under the Contract to timely abide by certain performance standards is of the utmost importance. The Contract requires the Employer to monitor (a) each 911 call is received and to log the time (down to the minute and second), (b) the time the call is received by the Employer, (c) the time the location is verified, (d) the time the ambulance crew is assigned, (e) the time en route to the scene, (f) the arrival time at scene, (g) the time arrived at the patient, (h) total on-scene time, (i) time en route to the transportation destination, (j) the total time to transport destination, (k) the arrival time at the destination, (l) the time of patient transfer to receiving personnel, and (m) the time to return to service status.

The Employer is required to submit a monthly report on all calls that includes documentation of the above times for each call. The Contract also sets forth the amount of time allotted for 911 call-to-scene times based on acuity and population density of the call location with highest acuity calls requiring an ambulance to be on scene within 10 minutes and lower acuity calls within an hour. For example, a call to a cardiac arrest – one of the most acute situations- must be responded to within ten minutes of the dispatch, adjusted for population density. A call of lesser urgency, like a psychiatric hold, can be responded to within an hour and still be deemed timely. In addition, the Contract requires the time from arrival at the hospital to transfer the patient to receiving personnel to be within 35 minutes.

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<sup>9</sup> Time off, vacations, and overtime are covered by the Agreement covering the paramedics and EMTs.

Captains do not make assessments of call acuity. Rather, to assess victim acuity, the dispatchers assigned to the ACRECC, under the oversight of the Employer's lieutenants, use a medical priority dispatch system (MPDS) which standardizes and codifies call prioritization and pre-arrival instructions to the EMTs and paramedics. Thus, 911 calls are graded based on the acuity of the emergency which determines the response parameters. Timely responses depend on the ability of the Employer to always know where all of its ambulances are at any given time, and the Employer uses real-time tracking software to accomplish this.

Each captain tracks the ambulances in his/her particular zone so that if a call comes in, he or she can assess the availability and progress of the crews in the area and adjust the dispatch or "swap the call," as needed. In this regard, the Employer contends that captains are able to override a post move or call from the dispatch center to meet timeliness guidelines or other exigencies.<sup>10</sup>

The "posting" of an ambulance is determined by the number of units available at any given time: for example, if only 10 of 20 units in a zone were available due to a mass-casualty emergency or traffic accident, the remaining 10 units would be spread out to cover a larger geographic area with fewer ambulances and post locations would necessarily be adjusted. These postings are not solely determined by the dispatchers but are effectuated according to a standard plan established by the Employer. The captain on duty has the authority to temporarily override that plan if circumstances warrant. For example, if a new post is ordered by dispatchers for a particular crew at the end of that crew's shift, a captain can override the post because by the time the crew travels to and arrives at the new location, the shift is already or soon to be over. To avoid this obvious inefficiency, the captain would notify dispatch that another crew should be assigned to the new post due to the ending shift.

Another example of a captain swapping a call is when an ambulance has a flat tire or a mechanical breakdown on the way to a call. The captain would reassign the call to another unit to ensure quicker response time within County metrics. The Contract requires that a patient be taken to the closest appropriate hospital and, pursuant to this requirement, captains can resolve questions about which hospital is the appropriate hospital by comparing wait times at the institutions and redirecting to a destination hospital with a shorter wait time. In this regard, the captain has the ability to monitor hospital capacity in his/her zone using equipment in his or her SUV and can redirect a unit if a particular hospital is too busy and the wait time would be detrimental to the patient. Documentary evidence submitted by the Employer reflected such a re-direct when a crew arrived at the dispatch destination, a psychiatric facility that did not accept patients in medical distress. The paramedic reported to the captain that the patient had become so physically sick en route to the psychiatric hospital that he could not be admitted, and the captain re-directed the crew to a nearby acute care hospital in the same town. Regarding another incident, one captain testified that he redirected a crew to a different hospital because the

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<sup>10</sup> One captain testified that Division Chief of Operations David Torres recently sent a mass email to all captains and managers instructing captains not to override dispatch; however, this was not corroborated by any other witness or any documentary evidence. Additionally, while the Employer did not call chief or Operations Torres as a witness, Director in Chief Snypes testified that she would have been on that email mailing list and never received such an email.

dispatch location had too long a wait time. The paramedic informed the captain that the patient was in trauma and had to be taken to Highland Hospital, one of the County's trauma centers, as originally dispatched, and the captain agreed.

The captains also monitor hospital delays where the ambulance crew is not able to return to service after dropping a patient at the hospital within the contractually established 35-minute standard. Due to staffing shortages and increased demand at hospitals caused in part by the Coronavirus pandemic, the current average hospital delay time is 51 minutes, which can mean that up to one-quarter of a shift can be spent waiting at hospitals. As a result, more stringent monitoring has been required to mitigate deployment delay. In the case of a hospital delay exceeding 90 minutes, the County contacted the Employer to encourage unilateral authorization of a "hard offload policy," meaning the patient is transferred by the crew from the gurney to a vacant chair so that the ambulance can return to service within the allotted timeframe. That directive from the County was relayed by Employer management to captains who were authorized and encouraged to use hard offloads when a hospital delay exceeds 90 minutes. In the alternative, the captain can direct that the patient be taken to another hospital with better availability and shorter wait times in order to meet the Contract's mandated metrics.

The Contract requires the Employer to increase its staffing to meet the needs of the County, but nothing in the record indicates that captains have the authority to independently order crews to work over their shift time and incur overtime. Mandatory callback and holdover provisions are included in the Agreement, but no evidence was submitted to establish that captains have any role in imposing mandatory callbacks or holdovers in the event of mass-casualties.

### ***The Captains' Authority to Discipline or Effectively Recommend Discipline of Employees***

The Agreement provides that the Employer will normally attempt to remedy policy violations, misconduct, and performance problems through informal corrective action such as training and counseling before resorting to formal progressive discipline. Formal progressive discipline normally consists of one or more verbal warnings, written warnings, and a last and final warning before discharge. As noted above, the Employer employs 450 EMTs, paramedics, and trainees and 15 captains. In support of its assertion that the captains possess supervisory authority within the meaning of Section 2(11) of the Act, the Employer submitted in evidence a total of 10 disciplinary records reflecting disciplinary involvement by 5 captains. Director in Chief Carolina Snypes, three captains, and an advanced paramedic testified regarding the issuance of discipline at the hearing.

Each captain prepares a daily report at the end of his or her respective shift, which includes an activity log for the captain, an activity log for all the units in that captain's zone, any maintenance issues, delays, and a narrative: these shift reports, which provide the only record of activity during that shift, are regularly reviewed by those in the above-described chain of command. The shift reports also note any unusual crew interactions, including any incident that

might subject an employee to discipline. In addition to noting crew interactions on the shift report, a captain can also complete an “incident report” that might outline the event as an issue or describe a corrective action taken.

Captains are familiar with the Agreement that covers the paramedics and EMTs and ensure that they comply with its provisions, as well as the company’s policies and procedures. The Agreement contains a progressive discipline procedure under which the captains issue discipline to paramedics and EMT’s with regard to timeliness of dispatch response, hospital delays, being out of uniform, and the like.<sup>11</sup> Corrective action can consist of an oral instruction (for example, to don a uniform), or a written warning or counseling note intended to document the discipline. A General Corrective Action form is completed by the captain overseeing the crew member at issue, indicating the nature of the infraction and level of discipline issued, as well as previous actions against this employee.

It is undisputed that the Employer has a practice to classify infractions subject to discipline as either objective (a straight-forward infraction that requires no additional investigation) or subjective (an incident necessitating additional evidence and review). Captains can generally issue discipline for a straight-forward objective violation that they have observed. The Employer submitted three disciplinary records of this type: After being alerted by dispatchers at ACRECC that one of her crews had gone outside the two-mile limit to take their lunch, the captain contacted them and asked if they had gotten permission, which they had not. She verbally warned them not to do it again and noted the incident in her daily incident report (Employer Exhibit 3(a)). Another document reflected that a captain issued a General Corrective Action form to an EMT for being out of uniform while on duty (Employer Exhibit 4(a)). In addition, another captain issued a verbal warning documented in a General Corrective Action form for failure to respond to a dispatch within the County-mandated time frame of 90 seconds from dispatch to roll out, known as a “chute violation” (Employer Exhibit 4(b)). In all three instances, the captains issued verbal warnings. One captain testified that issuing corrective actions in certain subject areas such as attendance, driving, and general conduct/performance are “automatic,” i.e., if the event occurred, the corrective action will be documented by the captain.

Another example of a “general” discipline for an objective infraction involved an employee posted at a mass COVID-19 vaccination site at the Oracle Arena who made unprofessional/unsanctioned comments on a required FEMA form and submitted it to Command staff (Employer Exhibit 6). The investigation of this incident was assigned to a captain who issued the least severe penalty of a written verbal warning for this infraction. The captain who issued this discipline did not testify at hearing, and Director Snypes did not testify as to the details surrounding this incident, including what the offensive remarks were on the FEMA form, what the captain took into consideration in deciding to issue the discipline, and who else, if anyone, was involved in his deliberations. An example of a documented coaching issued by a captain (Employer Exhibit 3(b)) occurred when she could not reach the crew via radio or their

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<sup>11</sup> The progressive disciplinary procedure provides for verbal warning, followed by a written warning, and a last and final warning followed by termination.

unit cell phone, which was turned off. She reached out to the lieutenant on duty at ACRECC who got through to the crew. She issued the coaching as a result of the crew's demonstrated violation of the policy to keep their cell phone on as a secondary method of communication.

The captains can also issue corrective actions for objective time and attendance infractions by automatically applying the Employer's established policies. The underlying time and attendance records are monitored by others on the management team – often a shift commander – who completes an audit after being alerted by a scheduler and then assigns one of the captains to issue the appropriate discipline to the employee. The Employer explained that this was done so that one person was not issuing all the time and attendance disciplines, but rather this task was spread out between all of the captains. The two disciplinary documents provided were a verbal warning issued for attendance infractions for “Home Early/Call Outs” without approved leave (Employer's Exhibit 4(c)) and a written warning for a similar infraction for which a verbal warning had previously been issued (Employer Exhibit 4(d)).

More complex subjective violations that would require further investigation are generally referred to an Investigation Team consisting of several captains and other managers, including Director in Chief Snypes, Division Chief of Operations Torres, and former Shift Commander Ryan Preston.<sup>12</sup> Generally, the captain involved conducts crew interviews, reviews documents, and prepares an Investigative Packet or Investigation Summary which is provided to the Investigation Team. In advance of preparing the Investigation Summary, the captain will have discussions with the command group about the process, such as whether there is a past practice of issuing discipline in the area involved. According to the Employer, factual findings are usually taken as conclusive and not independently investigated by other managers. The captain who conducted the investigation can recommend an appropriate discipline based upon his or her findings.<sup>13</sup>

Although the Employer asserts that in the case of these subjective and more complex infractions, the captains' discipline recommendations contained in their Investigation Summary were approved 90% of the time by the Investigation Team, the record evidence submitted by the Employer does not bear this assertion out.

Specifically, the Employer produced disciplinary records regarding an incident where an ambulance en route to an emergency call entered into a “side show,” where private vehicles were engaged in unlawful stunts at an intersection for the entertainment of a crowd of about 100

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<sup>12</sup> The Agreement requires that investigations be completed within 21 days of the incident: inability to meet that deadline might result in a request for an extension or no discipline issued.

<sup>13</sup> One captain testified that he does not give recommendations on discipline. Rather, he gathered information and prepared an Investigative Packet regarding an incident where an employee backed into another vehicle but stated that he did not recommend any specific discipline be taken. No records were submitted in evidence regarding this incident. The captain involved confirmed that in the instance of other “more serious” accidents, the Investigation Team handled the investigation after he had gathered the information on a prepared form and submitted it to them.



people<sup>14</sup> (Employer Exhibit 5). The show was posted on social media by members of the crowd and the ambulance crew used their phones to record themselves performing these unlawful maneuvers with their lights and sirens activated. The Employer was informed of this incident by several outside sources, including the Oakland Police Department, and the investigation was assigned to the Investigation Team, which then assigned two captains to review camera footage, interview witnesses, and ultimately prepare the Investigative Packet.<sup>15</sup> However, before the Investigation Summary was prepared, the investigating captain had already spoken with Director in Chief Snypes and asked her whether the employees could be given the opportunity to resign in lieu of being terminated. Consequently, one of the employees had already resigned the day before the recommendation was submitted and the other employee who did not opt to resign had already been terminated. Thus, the captain's recommendation was written after the decision about discipline had already been executed by upper management and was essentially *fait accompli*. Director in Chief Snypes' control over the recommendation to terminate is reflected in the December 29 Investigation Summary itself. As the captain who prepared the Investigation Summary testified, the shift commander decided that the sideshow incident should go to the investigation unit and he provided documents and video tape for the captains to review. The Investigating Committee met with Division Chief Torres and Director in Chief Snypes. Everyone had met with command staff regarding this incident and had heard their views about what the Employer's response should be. The captain also spoke with Snypes immediately after the meeting. As a result, at the time she was preparing the Investigation Summary, she already knew what the outcome was and put that in her recommendation. On cross-examination, the captain continued to maintain that the decision had already been made in consultation with Snypes before her report was written.

In another disciplinary record submitted by the Employer, a captain was made aware by the scheduling department that an employee appeared to have engaged in a pattern of timecard fraud (Employer Exhibit inadvertently un-numbered, Investigation Summary dated 4/29/21). The captain audited the relevant timecards provided by the scheduler, interviewed the employee in the presence of a Union representative, and concluded that a violation had occurred and recommended either termination or, based on similar infractions by others, a last and final warning. However, during the course of the investigation, the Employer learned that for other reasons the employee was going to resign for another job and was leaving anyway.<sup>16</sup> However, the record does not establish whether the employee was nevertheless terminated. Although, since he was already gone by the time the investigation was completed, the Employer deemed

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<sup>14</sup> An example of a "side show" maneuver would be making "donuts," or rotating the rear or front of the vehicle around the opposite set of wheels at a high rate of speed in a continuous motion to create a circular skid-mark, or "donut" on the pavement.

<sup>15</sup> The captains do not have the authority to "pull" video from the ambulance but can review it after it is given to them by a shift commander or Chief.

<sup>16</sup> In this regard, the captain's summary refers to the employee having almost completed his "two-week period," which appears to be a reference to his notice that he was resigning from the Employer, and notes that the employee even questioned if he had to attend the investigatory meeting.

him ineligible for rehire even though the investigating captain did not recommend this.<sup>17</sup> Thus, this instance does not demonstrate that the captain effectively recommended discipline, inasmuch as there is no evidence that the employee was terminated, and such action would have been *fait accompli* since the employee had already given notice and left the company.

With regard to another disciplinary record submitted by the Employer, a captain was assigned an investigation regarding an unaccounted-for vial of narcotics which the employee had apparently put in his pocket and forgotten (Employer Exhibit 8). While the investigation was still in progress, Division Chief Torres raised some additional questions and asked the captain to investigate further to ascertain whether the missing vial had indeed been returned to inventory as the employee asserted. A captain on the team recommended that the employee be issued a last and final warning, consistent with other similar serious incidents in the past, and offered to draft the Investigation Summary with her recommendation. Commander Preston replied that he would forward an email from Chief Torres “regarding his [Torres’] thinking on the discipline for this one because he has not decided for sure.” The next day, Commander Preston sent an email stating, “Reviewed the email from Torres. Looks like we’re waiting for a final final from the Chiefs. You will need to follow up with him.” The Employer described the review as a “group effort” because this was an unusual occurrence. However, the email chain between Commander Preston and the captains indicates that any authority of the captains to pursue the investigation as they saw fit and make an independent recommendation was circumscribed by command staff actions. In this regard, command staff controlled the investigation, and the captains could not proceed to draft the Investigation Summary without direction from Chief Torres. As one of the investigation team captains involved testified, the investigation was not completed, the Investigation Summary was never drafted, and the captain’s recommendation was not followed because Chief Torres wanted to go in another direction. This documentary evidence and testimony does not support the Employer’s contention that captains have the authority to effectively recommend discipline.

As reflected in the remaining disciplinary record submitted by the Employer, a captain was assigned by a shift commander to investigate a “massive” four-minute chute delay by two employees who were waiting for food at a drive-through restaurant and did not promptly respond to a dispatch. As noted above, the County allows no more than 90 seconds for chute time from dispatch to leaving the post location. After reviewing the circumstances and conducting an investigation, the captain recommended a documented counseling, but this recommendation was overruled by Division Chief Torres in favor of a verbal warning.<sup>18</sup> The captain who made the original recommendation testified that even though captains may give disciplinary recommendations, they do not have the “final stamp of approval,” and, although their recommendations are considered, they are not “set in stone.” This instance confirms that view, and thus fails to show that captains can effectively recommend discipline, since the ranking officer expressly rejected his recommendation in favor of lesser discipline.

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<sup>17</sup> The Employer asserted that a not-eligible-for-rehire designation was common practice for employees who had been terminated.

<sup>18</sup> As reflected in the Agreement, documented counselings are not considered to be actual corrective actions.

### ***The Captains' Authority to Hire and/or Promote Employees or to Effectively Recommend the Same***

The captains are not involved with the hiring of paramedics or EMTs. The Contract provides that the Employer have a certain number of sergeants, who are usually temporarily promoted from the unit of paramedics and EMTs. Generally, a sergeant must be available to temporarily perform the duties of any of the four shift captains if one is unavailable by virtue of having called out sick, on vacation, or standing in for a shift commander. The Employer conceded that but for this provision in the Agreement, it would just exclusively use captains and not have sergeants at all.

Paramedics and/or EMTs may apply to act as sergeants and must be interviewed by a panel of captains, shift commanders, or sometimes Division Chief of Operations Torres. Captains often participate in the interview process because they are most familiar with the applicants and their abilities and can make recommendations as to who to be considered and ultimately selected. However, no example was proffered of a captain effectively recommending that a unit employee temporarily act as a sergeant.<sup>19</sup>

Sergeants temporarily filling in for captains cannot conduct investigations or issue discipline by virtue of their being in the bargaining unit. Rather, they only monitor system compliance and response and clearance times and can also direct crews to certain hospitals during the time they are acting. If a sergeant observed an infraction of a company rule or policy by a crew member, he or she would document it on the daily log or on an incident report and then refer it to a captain for follow-up. Sergeants acting as captains can prepare an accident or injury packet, but as noted above, cannot conduct investigations, or recommend discipline. They are not considered part of the "management team" and do not attend management meetings. Sergeants receive a \$1.00 an hour pay differential for time they temporarily act as sergeants.

### ***The Captains' Miscellaneous Responsibilities***

The captains attend daily roll call meetings (one at the beginning of each 12-hour shift) to discuss operational issues, disseminate company information, and receive feedback from other captains: these meetings are for captains and occasionally Commanders, and are distinct from the daily all-hands meeting attended by the unit paramedics and EMTs. Sergeants acting as captains can also attend portions of these meetings that do not involve confidential company information not accessible by unit employees. Captains also attend special team meetings, including government relations, community outreach, and special events, and can negotiate contracts for events. Community events might include, for example, bicycle races or school presentations. Captains can also participate in a special Honor Guard for fallen colleagues: the organizing, training, and unforming is conducted by a volunteer captain as a special team.

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<sup>19</sup> One captain testified that he recommended an employee to be considered for an unspecified promotion, but his recommendation was not taken.

There is also a specialized “TEMS” team consisting of one shift commander and several captains, in addition to paramedics and EMTs, that works in conjunction with local law enforcement agencies to provide services in “warm” or “hot” zones where there is a possibility of danger to the public, gunfire, or civil unrest. There is a team lead, who can be either a captain or a crew member since this assignment is based on performance and time in service.<sup>20</sup>

### ***APPLICABLE LEGAL STANDARD***

Supervisors are explicitly excluded from coverage under the Act, and Section 2(11) defines them as:

Any individual with the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The party asserting supervisory status has the burden of establishing the existence of the foregoing indicia by a preponderance of the evidence, and further must show that the purported supervisors:

- (1) hold the authority to engage in any one of the twelve supervisory functions set out in the statute, including, without limitation, the authority to assign, responsibly direct, discipline, or discharge employees;
- (2) that their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and
- (3) that their authority is held “in the interest of the Employer. ”

*NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001); *Shaw Inc.*, 350 NLRB 354, 355 (2007); *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006). It is not required that the individuals in question actually exercise this authority, as the possession of such authority is all that is required by Section 2(11) of the Act. *See, e.g., Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007), and cases cited therein. Moreover, an individual may be properly classified as a supervisor if he or she meets only one of the criteria enumerated in Section 2(11), as the Board does not require all factors to be satisfied nor does it assess the degree or frequency of the exercise of any of the duties. *See Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 (2001).

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<sup>20</sup> “TEMS” appears to be an acronym, but it is not defined in the record.

## ***APPLICATION OF BOARD LAW TO THE INSTANT CASE***

As noted above, the party seeking to prove supervisory status must establish it by a preponderance of the evidence. *Oakwood Healthcare, Inc.* 348 NLRB 686, 694 (2006). Moreover, purely conclusory evidence does not satisfy that burden. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) Based upon a careful examination of the totality of the evidence and the positions of the parties, I have concluded that the Employer has failed to meet its burden. Accordingly, for the reasons set forth below, I find that the Captains are not statutory supervisors and are employees within the meaning of the Act.

It is undisputed that the captains do not have the authority to hire, fire, lay off, recall, discharge, or reward employees. The record fails to show that they possess any of the other primary indicia of supervisory status set forth in Section 2(11) of the Act.

### ***The Captains Lack the Authority to Discipline or to Effectively Recommend Discipline of Other Employees***

Contrary to the Employer's assertion, there is insufficient evidence that the captains have the authority to discipline other employees or to effectively recommend such action. The captains' primary function is to monitor and enforce paramedics' and EMTs' compliance with the explicitly described provisions of the Contract, the Employer's own workplace rules, and/or the Agreement. While the captains can issue warnings or corrective actions (not considered to be a form of discipline) to field employees for "objective" infractions, such as failure to wear a uniform or to respond to a call within defined parameters, this limited authority merely entails a mechanical application of the rules, performance metrics of the Contract, and provisions of the Agreement. *Oakwood Healthcare, supra*, at 697.

While the captains are involved in the investigation of more complex subjective infractions, their participation is limited because they cannot review videos without the authorization of higher-ups and do not initiate time and attendance infractions without being told to do so by the schedulers or shift commanders. Most importantly, the evidence fails to show that the captains can effectively recommend disciplinary action based on their investigations: effective recommendation requires that the recommendation be followed more often than not and the mere ability to make such a recommendation is not sufficient. Although the Employer asserted that the recommendations of the captains are followed 90 % of the time, it did not submit evidence to establish such a high acceptance percentage. Each of the examples provided by the Employer and summarized in detail above show that those in higher management – shift commanders, the Director in Chief or Division Chief of Operations – made the final decision and did not follow the recommendations of the captains. The committee system the Employer has established to investigate serious conduct and performance incidents in which command staff take the lead during the investigative phase is not conducive to the exercise of independent judgment on the part of the captains. Thus, because undisputed supervisors decide what

information the captains review as part of their investigations, meet with captains in advance of their drafting their recommendations and arrive at a consensus regarding what discipline, if any to issue, the captains are not free of the control of command staff in making their recommendations. Further, many of the recommendations ostensibly of the captains were made after employees had already resigned or been terminated, thus rendering such *fait accompli* recommendations moot.

Thus, I conclude that the Employer has failed to meet its burden to show that the captains have the authority to discipline or effectively recommend the discipline of employees.

***The Captains Lack the Authority to Assign or Responsibly Direct Other Employees Using Independent Judgement***

The Employer also failed to show that the captains possess the authority to assign or responsibly direct field employees using independent judgement. Assignment consists of “designating an employee to a place, appointing an employee to a time, or giving significant overall duties to an employee.” *Oakwood Healthcare, supra*, 348 NLRB at 689. Further, a supervisor must also exercise his or her Section 2(11) authority using independent judgment, which entails at a minimum acting or effectively recommending action free of the control of others and forming an opinion or evaluation by discerning and comparing data. *Id.* at 692-693.

In this regard, the record shows that the initial route assignments of field personnel are made by the dispatchers, who are not employees of the Employer, and that the posting of field personnel at locations outside the stations is determined based on an established plan of the County and the Employer. Although the Employer maintains that the captains override dispatch and reallocate field personnel based on a number of factors for example, the number of ambulances available, the nature of the calls, and traffic, no specific examples were provided of such actions nor was there any evidence of how or under what circumstances this occurred. The only evidence presented establishes that the decision to assign crews to places is circumscribed by the performance metrics of the County set forth in writing in the Contract. Each captain that testified regarding re-routing to other hospitals, swapping posts, and assessing hospital delay made their decisions routinely based on hospital wait times, written time requirements, or practical considerations dictated by the circumstances. For example, the captain who acquiesced to a paramedic’s assessment that his patient was in such an acute condition that the crew needed to go to the original dispatch destination, a trauma center, despite the wait time there, made the only call that could reasonably be made in the circumstances in reliance on the paramedic’s medical assessment at the scene. Another captain had no choice other than to re-route a crew because the dispatch destination, a psychiatric center, would no longer accept the patient in his deteriorated physical condition. No assignment of a crew to a place was based on complex discretionary decisions using independent judgment in the absence of written guidelines or instructions. Furthermore, overrides by captains of dispatch’s initial assignments were for the purpose of ensuring that field personnel met the strict timeliness metrics of the Contract. Thus, compliance with detailed contractual requirements was the sole basis for captains overriding the dispatchers’ instructions, since all field personnel have the same or similar skill and all the ambulances are, essentially, the same. *Alternate Concepts, Inc.*, 358 NLRB No. 38 at 296 (2012).

Furthermore, the captains' occasional overriding of dispatch to send a crew to another location (either to a call or to another hospital) was only temporary based on the exigent demands of the moment and did not involve the assignment of significant duties or an assessment of the skills and experience of individual employees. Thus, these temporary reassignments are merely *ad hoc* instructions that employees perform a discrete task, and not the requisite designation of an employee to a work location or time period as contemplated by the Board. See *Golden Crest Healthcare, supra*, 348 NLRB at 729. In these circumstances, the record fails to demonstrate that the captains assign employees utilizing independent judgement because it is largely "dictated or controlled by detailed instructions" set out in company policy and dictated by County guidelines. *Alternate Concepts, Inc. supra*; *Oakwood Healthcare, supra*, 348 NLRB at 693.

Moreover, the limited ability of the captains to override dispatch assignments does not constitute "responsible" direction of employees because there is no evidence that the captains are held accountable for the performance of the field personnel. To establish accountability, the party with the burden of proof must show that there is a prospect of adverse consequences for the putative supervisor if his or her directions to employees are not carried out. Absent such consequences, they cannot be found to responsibly direct employees within the meaning of Section 2(11) of the Act. *Alternate Concepts, Inc., supra*, 358 NLRB at 294; *Allstyle Apparel, supra*, 351 NLRB at 1287; *Golden Crest Healthcare, supra*, 348 NLRB at 731.

The facts in this case are distinguishable from the Board's decision on remand from the United States Court of Appeals for the Fifth Circuit in *Entergy Mississippi*, 367 NLRB No. 109 (2019). There, in applying the law of the case, the Board found dispatchers at an electrical utility company that transmits and distributes power throughout the State of Mississippi to be 2(11) supervisors because they exercised independent judgement in deciding how to allocate the employer's field employees to repair power outages. For example, the dispatchers had the authority to choose to prioritize industrial customers or other customers, such as residential customers, if the outage occurred at a time the industrial customer's factory was not operating. They could also prioritize outages that affect customers with special needs or that affect large numbers. No simple rule guided the dispatchers' multifaceted challenging decisions as to who to help first. Rather, dispatchers must use their judgment to decide whether to send the repair crew to a trouble location affecting the most customers, or to a hospital, or a factory, without the use of written guidelines. They could also use their judgment to decide there is more trouble than one field employee can handle and to reassign additional field employees the dispatchers deem necessary to handle the repair or to hold over employees from their regular shift, again, without guidelines dictating when they should reassign employees, how many to reassign or when to hold employees over on their shift.

Here, unlike the situation in *Entergy Mississippi*, the record does not establish that captains are unfettered in their decisions about re-routing ambulances to hospitals with shorter wait times. To the contrary, here, the decisions by the captains are rudimentary and circumscribed by the 106-page Contract with the County which requires the Employer to monitor the time it takes to complete multiple phases of each call and to adhere to wait time

requirements that captains are not authorized to override. Here, unlike the dispatchers in *Entergy Mississippi*, the record establishes that any re-routing or post swapping directed by the captains are in aid of meeting the County's performance metrics and not the result of the exercise of broad discretionary authority possessed by the captains or the use of independent judgment. Moreover, the record reflects no evidence that captains play a role in directing a crew to work overtime or holdover on their shifts, return to work pursuant to a mandatory call back or to independently decide without input from others to direct additional crews to increase emergency services at a particular location.

Based on the foregoing, I conclude that the captains do not have the authority to responsibly direct or assign employees using independent judgment.

### **The Captains Lack the Authority to Effectively Recommend that Unit Employees be Considered for Promotion and be Promoted**

The Employer argues that the captains have the authority to effectively recommend that unit employees be considered for and be promoted to temporarily act as sergeants. It is undisputed that these are temporary promotions of unspecified duration that would not occur but for the county's requirements set forth in the Contract. The Employer asserts that the sergeants only fill in for captains who are on vacation or call out sick, but record fails to disclose how often these temporary promotions last or how often they occur, or even how many unit employees in these positions fill in for captains at any given time. Thus, the evidence does not show that these are *bona fide* promotions, in that they are not permanent, and the authority of the sergeants is limited.<sup>21</sup> More importantly, the record does not provide a single example of a recommendation by a captain to promote a sergeant or whether and how it was considered by the Employer, much less followed.

Based thereon, I find that the Employer has failed to meet its burden to provide specific detailed evidence that the captains have the authority to effectively recommend the promotion of employees.

## ***FINDINGS***

Upon thorough review of the record as a whole, including the testimony and exhibits presented at the hearing and the briefs of the parties, and applying extant Board law as described above, I find that the Employer has failed to meet its burden to establish by a preponderance of the evidence that the captains are supervisors within the meaning of Section 2(11) of the Act in that there is insufficient evidence that they possess any of the primary indicia set forth therein.<sup>22</sup>

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<sup>21</sup> In fact, the Employer in its brief concedes that these are merely "occasional designations."

<sup>22</sup> While secondary indicia can be a factor in supporting a finding that individuals demonstrating statutory supervisory status, absent the putative supervisors possessing any of the primary indicia set forth in the Act, secondary indicia alone are not sufficient to establish supervisory status. *Golden Crest Healthcare, supra*, 348 NLRB 727 at 730, fn. 10. Because I have found that the Employer has failed to meet its burden of establishing any primary indicia of supervisory status as described above, I have not considered whether any secondary indicia may



Based thereon, I conclude that they are an appropriate unit and will order that an election be held.

### **CONCLUSIONS**

1. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>23</sup>
2. The parties stipulated, and I so find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the act and claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

**Included:** All Operation Captains employed by the Employer from its locations at 28333 Industrial Road, Hayward Ca 94545; 283 East Airway Blvd., Livermore CA 94551; and 325 Fallon Street, Oakland CA 94607.

**Excluded:** All other employees, guards, and supervisors as defined in the Act.

There are approximately 15 employees in the Unit. The parties agreed to a mail-ballot election.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. Employees will vote whether or not they wish to be represented for purposes of collective bargaining by **NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, NAGE EMS.**

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or may not exist. Moreover, I do not rely on the Employer's assertion that the rank of captain alone denotes or implies supervisory status.

<sup>23</sup> The parties stipulated, and I so find, that Falck Northern California Corp, a Delaware corporation, with an office and place of business located in Hayward, California, is engaged in the business of providing EMT and paramedic services. During the last twelve months, the Employer has made purchases equal to or exceeding \$50,000 from firms which in turn purchased goods directly from points outside the State of California.

## **A. Election Details**

The election will be conducted by U.S. mail. The ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At **5:00 p.m. on Friday, July 9, 2021**, ballots will be mailed to voters from the National Labor Relations Board, Region 32, 1301 Clay Street, Suite 300-N Oakland, CA 94612-5224. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is **not signed** will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by July 16, 2021, should immediately contact the Region 32 office at (510) 637-3300, or contact Board Agent Nicholas Tsiliacos at (510) 671-3046 to request a ballot.

**All ballots will be commingled and counted at the Regional Office on Tuesday, August 3, 2021.<sup>24</sup>** In order to be valid and counted, the returned ballots must be received in the Regional Office prior to the counting of the ballots.

## **B. Voting Eligibility**

Eligible to vote are those in the unit who were employed during the payroll period ending June 19, 2021, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **C. Voter List**

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<sup>24</sup> If, on the date of the count, the Regional Office is closed, or the staff of the Regional Office is working remotely, the count will be done remotely. If the Regional Director determines this is likely, a reasonable period before the count, the parties will be provided information on how to participate in the count by videoconference.

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters.

The Petitioner has waived the 10 days to receive the voter list. To be timely filed and served, the list must be received by the regional director and the parties by July 7, 2021. The list must be accompanied by a certificate of service showing service on all parties. **The Region will no longer serve the voter list.**

Unless the Employer certifies that it does not possess the capacity to produce the list in the required form, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/re-representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/re-representation-case-rules-effective-april-14-2015).

When feasible, the list shall be filed electronically with the Region and served electronically on the other parties named in this decision. The list may be electronically filed with website is accessed, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### **D. Posting of Notices of Election**

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notice of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the unit found appropriate are customarily posted. The Notice must be posted so all pages of the Notice are simultaneously visible. In addition, if the Employer

customarily communicates electronically with some or all of the employees in the unit found appropriate, the Employer must also distribute the Notice of Election electronically to those employees. The Employer must post copies of the Notice at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

### **RIGHT TO REQUEST REVIEW**

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of the Decision until 10 business days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this Decision after the elections on the ground that it did not file a request for review prior to the elections. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations. A request for review must be E-filed through the Agency's website and may not be filed by facsimile. To E-File the request for review, go to [www.nlrb.gov](http://www.nlrb.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.<sup>25</sup> A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

DATED at Oakland, California on the 2<sup>nd</sup> day of July 2021.

/s/ Valerie Hardy-Mahoney

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Valeria Hardy-Mahoney, Regional Director

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<sup>25</sup> On October 21, 2019, the General Counsel (GC) issued Memorandum GC 20-01, informing the public that Section 102.5(c) of the Board's Rules and Regulations mandates the use of the E-filing system for the submission of documents by parties in connection with the unfair labor practice or representation cases processed in Regional offices. The E-Filing requirement went into immediate effect on October 21, 2019, and the 90-day grace period that was put into place expired on January 21, 2020. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001, and must be accompanied by a statement explaining the circumstances concerning not having access to the Agency's E-Filing system or why filing electronically would impose an undue burden.

National Labor Relations Board, Region 32  
1301 Clay Street Suite 300N  
Oakland CA 94612-5224